



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 14, 2013

Ms. Molly Cost  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2013-04297

Dear Ms. Cost:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 481349 (PIR# 12-4261).

The Texas Department of Public Safety (the "department") received a request for dash cam recordings pertaining to a specified traffic stop. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you state the submitted information has previously been requested and released by the department. You acknowledge the Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the department may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. In this instance, you contend the submitted information is confidential by law and must be withheld under section 552.101 of the

Government Code. Thus, we will consider your argument under section 552.101. Further, as sections 552.1175 and 552.130 of the Government Code make information confidential by law, we will address the applicability of these sections to the submitted information.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information other statutes make confidential. Section 411.00755 of the Government Code states in pertinent part:

(b) The personnel records of a commissioned officer of the department may not be disclosed or otherwise made available to the public, except the department shall release in accordance with Chapter 552:

(1) any letter, memorandum, or document relating to:

...

(B) misconduct by the officer, if the letter, memorandum, or document resulted in disciplinary action[.]

*Id.* § 411.00755(b). Section 411.00755 defines a personnel record, in part, as “any letter memorandum, or document maintained by the department that relates to a commissioned officer of the department[.]” *Id.* § 411.00755(a). For the purpose of section 411.00755, “disciplinary action” means discharge, suspension, or demotion. *Id.* § 411.0072(a)(1).

You state the submitted information is related to a complaint against and investigation of commissioned officers of the department, and you state the investigation has not resulted in disciplinary action against the officers. Thus, you contend the submitted information consists of the personnel records of the officers at issue. However, we note you state the submitted information consists of records pertaining to a criminal investigation by the department. The present request does not specifically seek officers’ personnel records. Because the requestor generally seeks information pertaining to the specified incident, both an officer’s personnel records and any copies of investigatory materials the department maintains for law enforcement purposes are responsive. The department may not engraft the confidentiality afforded to personnel records under section 411.00755(b) to records that exist independently of the personnel records. Accordingly, the submitted information is not confidential under section 411.00755(b) and it may not be withheld under section 552.101 on that basis. However, we will consider the applicability of other exceptions to disclosure for the submitted information.

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Federal courts have recognized individuals have a constitutional right to privacy in their unclothed bodies. Quoting the United States Court of Appeals for the Ninth Circuit, which concluded, "[w]e cannot conceive of a more basic subject of privacy than the naked body[,]" the United States Court of Appeals for the Second Circuit has found "there is a right to privacy in one's unclothed or partially unclothed body, regardless [of] whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment." *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (quoting *York v. Story*, 324 F.2d 450, 455 (9<sup>th</sup> Cir. 1963)). Portions of the remaining information depict the partially unclothed bodies of identifiable individuals. We find these individuals have a constitutional right to the privacy of this information that outweighs any public interest in its release. Therefore, the department must withhold the information at issue, which we have noted, under section 552.101 in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). Upon review, we find some of the submitted information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information at issue, which we have noted, under section 552.101 of the Government Code in conjunction with common-law privacy.

Some of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). Some of the remaining information, which we have noted, relates to officers of the department but the information is not held by the department in an employment capacity. Accordingly, to the extent the officers at issue elect to restrict access to their information in accordance with section 552.1175(b), the department must withhold the information we have noted that pertains to the officers under section 552.1175 of the Government Code. Conversely, if the officers at issue do not elect to restrict access to their information in accordance with section 552.1175(b), the information we noted that pertains to the officers may not be withheld under section 552.1175.

We note some of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Upon review, we find the remaining information contains motor vehicle record information. Accordingly, the department must withhold the motor vehicle record information we have noted, as well as any discernible license plate numbers in the submitted dash cam video recordings, under section 552.130 of the Government Code.

In summary, the department must (1) withhold the information we noted under section 552.101 in conjunction with constitutional privacy; (2) withhold the information we noted under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold the information we have noted under section 552.1175 of the Government Code, to the extent the officers at issue elect to restrict access to their

information in accordance with section 552.1175(b) of the Government Code; (4) withhold the motor vehicle record information we have noted, as well as any discernible license plate numbers in the submitted dash cam video recordings, under section 552.130 of the Government Code; and (5) release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 481349

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)